

GAI (Migration) [2019] AATA 3264 (22 March 2019)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANTS:	Ms Jianying GAI Ms Peng Xiao
CASE NUMBER:	1716428
HOME AFFAIRS REFERENCE(S):	BCC2015/1854418
MEMBER:	Hugh Sanderson
DATE:	22 March 2019
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the applications for Partner (Temporary) (Class UK) visas, with the direction that the first named applicant meets the following criteria for a Subclass 820 (Partner) visa: • cl.820.211 of Schedule 2 to the Regulations; • cl.820.221 of Schedule 2 to the Regulations; and • r.2.03A.

Statement made on 22 March 2019 at 12:46pm

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – genuine de facto relationship – registered a business together – mutual knowledge of each other’s financial circumstances – living together – sharing care of the applicant’s daughter – 12 month requirement – decision under review remitted
1.

LEGISLATION

Migration Act 1958 (Cth), ss 5CB, 65
Migration Regulations 1994 (Cth), rr 1.09A, 2.03A; Schedule 2, cls 820.211, 820.221

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Immigration and Border Protection to refuse to grant the applicants Partner (Temporary) (Class UK) visas under s.65 of the *Migration Act 1958* (the Act).
3. The first named applicant (the applicant) applied for the visa on 26 June 2015 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
4. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211 and cl.820.221 because the delegate was not satisfied the applicant was the de facto partner of the sponsoring partner.

Background

5. The applicant is a citizen of China and is currently 54 years old. The second named applicant is her daughter who has applied for the visa on the basis of being a member of the family unit of her mother. She is currently 29 years old.
6. The applicant's daughter first entered Australia in 2007 when she was 18 years old and held a Student visa. She has resided primarily in Australia since that time. The applicant entered Australia for the first time in 2009 on a Visitor visa. She next entered Australia in August 2012 on a Visitor visa. She has remained primarily in Australia since August 2012 on a series of Visitor visas until the current application was made. She divorced her husband, who remains living in China, on 26 June 2014.
7. The sponsor of the visa applicant is Qijie Chen. He was born in China and is currently 56 years old. He first entered Australia in 2007 and has not departed Australia since then. He was granted the right to reside permanently in Australia. He was married to Hujie Liu and there are two children of that relationship are currently aged 27 and 24 years old. It was claimed that the sponsor separated from his wife on 1 April 2014. His wife and children continue to live in China.
8. The parties claim they first met each other on 15 June 2013 when they were introduced by mutual friend at a restaurant. A relationship developed after that time and when the applicant returned to China they continued to communicate with each other by telephone. The parties went on a holiday together to the Gold Coast in April 2014 and then commenced living together on 18 May 2014 which was when they considered they commenced their de facto relationship.
9. The applicant provided a number of documents in support of the application including various statements by friends, bank statements, photos of the parties together, and evidence they had registered a company with the parties as the office holders and members of the company.
10. The delegate who considered the application noted the following issues:

- The bank documents did not indicate the parties were pooling their financial resources or sharing their household expenses;
- The company documents did not provide any details of any business operated by the parties together;
- Although the parties may have been sharing the same home, this did not mean they were living together as a couple;
- The photos and statements by friends did not provide convincing evidence of a genuine relationship; and
- There was little information indicating a genuine commitment to a long-term relationship with each other.

11. The delegate was not satisfied that the applicant was the de facto partner of the sponsoring partner as defined in s.5CB of the Act. Accordingly, the delegate found the applicant did not meet the criteria in cl.820.211 and cl.820.221 and refused the application.

Information to the Tribunal

12. The applicant provided further information to the Tribunal including the following:
 - Joint bank account details of the parties account with ANZ Bank;
 - Wei Chat records;
 - Photos of the parties together with various social events;
 - Company records of Jianjie Enterprises Pty Ltd;
 - Statements by friends as to the genuineness of the relationship;
 - Receipts for the purchase of items of various personal property;
 - Receipt for the applicant's daughters study at Western Sydney University, paid for by the sponsor;
 - Evidence of the parties travelling together on holidays;
 - Correspondence from doctors confirming the applicant had taken steps to have IVF treatment;
 - Divorce of the sponsor dated 21 November 2017; and
 - Marriage certificate the parties dated 21 June 2018.
13. The applicants appeared before the Tribunal on 6 March 2019 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor. Three other witnesses attended the hearing to give evidence in support of the application, however, the Tribunal did not consider it necessary to speak to those witnesses. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages. The applicants were represented in relation to the review by their registered migration agent who attended the hearing.

14. The applicant and the sponsor gave consistent information as to various aspects of the claimed relationship. This included details of their home, their work, their financial arrangements and their relationships with their families in China. They provided details of their future plans together and the plans for the applicant's daughter. The applicant's daughter gave information as to the relationship.
15. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

16. The issue in the present case is whether the applicant is the spouse, as defined in s.5F of the Act, of the sponsoring partner.

Whether the parties are in a spouse or de facto relationship

17. Clause 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to have been the de facto partner of the sponsor who has the right to reside permanently in Australia at the time of the application. The parties now claim to be married and the applicant is the spouse of the sponsoring partner.
18. 'De facto partner' is defined in 5CB of the Act, which provides that a person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2).
19. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d).
20. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The parties were married on 21 June 2018 in Sydney. There is nothing to indicate that the marriage between the parties is not valid. On the evidence, at the time of this decision the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a de facto or spousal relationship met?

21. In forming an opinion whether they are in a de facto or spousal relationship consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.09A(3) for a de facto relationship which is attached to this decision. The considerations as to whether the parties are in a spousal relationship is set out in r.1.15A(3) which contain similar provisions to r.1.09A(3). Each of the specific matters contained in r.1.09A(3) and r.1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Financial aspects

22. There is extensive information indicating the financial aspects of the relationship supports a finding the parties are in a genuine and continuing relationship. The parties registered a business together, Jianjie Enterprises Pty Ltd, in 2016. Both parties are engaged in working for the business, the sponsor is actively involved in bricklaying and supervising the subcontractors and employees of the business carrying out contracts. The applicant is involved in transporting workers to various sites as well as being engaged in various bookkeeping tasks for the business. The parties are both directors of the business and both parties have access to the business accounts. Both parties receive wages from the business. The parties at the hearing gave evidence as to the operation of the business which indicated they are both directly involved with the operation of that business.
23. The parties have joint bank accounts into which their income is deposited and which they use together. The parties joint income is used to meet their day-to-day household expenses and also provide for the applicant's daughter. This includes meeting education expenses for her. The parties have been sharing their expenses since they started living together in May 2014.
24. The parties have made a financial commitment together in respect of a development in Ryde which will see them owning an apartment. The parties have made a significant financial commitment together for the purchase of this property. The applicant owns property in China as a result of a property settlement she had with her former husband. The parties provided consistent information as to the current arrangements for this property and the intention to sell that property if the applicant is granted permanent residence in Australia. The parties have shown they are aware of each other's financial situation indicating they have made plans for the future based on a mutual knowledge of each other's financial circumstances.
25. The Tribunal finds that the parties have been pooling their financial resources and have made commitments to the purchase of joint assets together. They have been sharing their day-to-day household expenses since they started living together in May 2014. The above evidence supports a finding that the parties are living together and have a mutual commitment to a shared life together and that their relationship is genuine and continuing.

Nature of the household

26. The applicant and the sponsor have been living together with the applicant's daughter since May 2014. Over that time, they have shared in the joint responsibility of caring for the applicant's daughter who has a very close relationship with the sponsor. The parties provided consistent information as to tenants who have also been residing in their household and also the arrangements within their home.
27. The Tribunal finds the parties have been living in a shared household since May 2014. In that household, the parties have been sharing of the care of the applicant's daughter and also in the maintenance of that home. The nature of the household the parties have established indicates they are living together in a genuine and continuing relationship.

Social aspects

28. Statements have been provided by friends of the parties supporting the claim that the parties have a mutual commitment to a shared life as husband and wife to the exclusion of all others and that their relationship is genuine and continuing. Witnesses attended the hearing ready to give evidence to the Tribunal. Although the Tribunal did not ask those witnesses to present evidence, the fact that they were willing to attend the hearing and give evidence in support of

the application is an important factor when considering whether parties represent themselves to other people as being in a genuine relationship.

29. The parties have engaged in various social activities together. Includes attending at a local clubs and travelling together for holidays within Australia. The parties provided consistent information as to the various social activities they participate in. The parties provided consistent information about the contact each have with their extended family members.
30. The Tribunal finds that the parties represent themselves as being in a married relationship and have represented themselves as being in a de facto relationship since they first started living together in May 2014. The Tribunal finds that this relationship is accepted by their friends in Australia and their relationship is recognised as genuine.

Commitment to each other

31. The applicant's relationship with her former husband ended well before she divorced him in June 2014. The evidence of the applicant's daughter confirmed that her parents' relationship had not been harmonious for many years and that the fact that the parties got divorced was not unexpected. The applicant's daughter now has little contact with her biological father and considers her relationship with the sponsor to be closer than that with her biological father.
32. At the time of the application, the sponsor had not seen his former wife since arriving in Australia in 2007. The sponsor has given information which indicated that he believed his former wife had been in a relationship with another man since 2012. The sponsor divorced his wife in China on his application in 2018. He has little or no contact with his adult children from that relationship. He has no continuing contact with his former wife.
33. The parties first met each other in June 2013. They decided to commit to a de facto relationship with each other in May 2014 when the applicant and her daughter moved in to live with the sponsor. They have now been living together for almost five years. They were married on 21 June 2018.
34. The parties displayed an intimate knowledge of each other's lives and issues which confront them. The applicant was aware of the circumstances which led the sponsor to come to Australia and apply to reside in Australia permanently. Both parties were aware of the circumstances of the breakdown of the relationships of their partners' prior marriages. The applicant's daughter gave convincing evidence as to her relationship with the sponsor and the emotional support that she receives from him. She gave evidence as to the emotional support that the applicant and the sponsor give to each other.
35. The parties have made plans for their future together including investing in a real estate purchase. The applicant took steps to be able to have a child together through IVF despite her age and the difficulties of falling pregnant at her age. The parties provided consistent information as to their plans for their future together indicating they considered their relationship as long-term.
36. The Tribunal finds that the parties provide a high degree of companionship and emotional support to each other which would be expected in a relationship where the parties have a mutual commitment to a shared life with each other and where the relationship is genuine and continuing. The plans that they have for their future together indicates they considered the relationship as long-term.

Other issues

37. When considering whether the parties are in a de facto relationship, they must not be related by family. The applicant and the sponsor are not related by family.
38. The Tribunal has considered all the circumstances of the parties both individually and cumulatively. The Tribunal finds that the weight of evidence supports a finding that the parties have a mutual commitment to a shared life as husband and wife to the exclusion of all others, that the relationship is genuine and continuing, and that they have been living together.
39. On the basis of the above the Tribunal is satisfied that the requirements of s.5CB(2) are met at the time the visa application was made and that the requirements of s.5F(2) are met at the time of this decision. The Tribunal finds the applicant meets the criteria in cl.820.211(2)(a) at the time of the application and continues to meet this criteria at the time of the decision.
40. At the time of the application the applicant was sponsored by the sponsoring partner who was her de facto partner and was an Australian permanent resident. She continues to be sponsored by the sponsoring partner who is her spouse. The Tribunal finds the applicant meets the criteria in cl.820.211(2)(c) at the time of the application and continues to meet this criteria at the time of the decision.
41. At the time of the application the applicant held a substantive visa therefore the criteria in cl.820.211(2)(d) is not relevant.
42. Therefore the applicant meets cl.820.211 and cl.820.221.

Are the additional criteria for a de facto relationship met?

43. Persons claiming to be in a de facto relationship for a partner visa must also meet the additional criteria in r.2.03A. Both members of the couple must be at least 18 years old: r.2.03A(2). In this case, at the time of application, the applicant and the sponsor were at least 18 years old.
44. The applicant must have been in the de facto relationship for at least the 12 month period ending immediately before the date of the application: r.2.03A(3). This requirement will not apply in limited circumstances, such as: where the de facto relationship has been registered under a relevant State or Territory law (for applications made on or after 9 November 2009); where the applicant can establish compelling and compassionate circumstances for the grant of the visa; or in certain circumstances where the sponsor held, holds or is applying for a permanent humanitarian visa.
45. There is no evidence that the relationship was registered under a relevant State or Territory law or that the sponsor held, holds or is applying for a permanent humanitarian visa, so they must meet the 12 month requirement.
46. As set out above, the Tribunal finds of the parties started living together in May 2014. They had been living together since that time. The Tribunal finds that the parties decided to commit to living together in a de facto relationship and commenced that relationship in May 2014 they moved to their current home. The circumstances of the parties relationship since that time supports the finding that in May 2014 the parties made the commitment to live together in a de facto relationship and the arrangements they made together at that time were indicative the parties being in a de facto relationship as defined in s.5CB of the Act.

47. Accordingly, the Tribunal is satisfied that the applicant had been in the de facto relationship for at least the 12 month period ending immediately before the date of the application.
48. For these reasons the Tribunal is satisfied that the applicant meets the additional criteria prescribed in r.2.03A.
49. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.
50. As the Tribunal has concluded that the applicant meets the stated criteria for the grant of the visa and the matter is to be remitted to the Minister to consider the remaining criteria, it is appropriate that the application of the second named visa applicant be remitted for consideration in full as a member of the family unit of the applicant.

DECISION

51. The Tribunal remits the applications for Partner (Temporary) (Class UK) visas, with the direction that the first named applicant meets the following criteria for a Subclass 820 (Partner) visa:
 - cl.820.211 of Schedule 2 to the Regulations;
 - cl.820.221 of Schedule 2 to the Regulations; and
 - r.2.03A.

Hugh Sanderson
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.09A De facto partner and de facto relationship

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits *the* regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).